City of Carmel

Carmel/Clay Advisory Board of Zoning Appeals
Special Meeting
Wednesday, October 13, 2004

The special meeting of the Carmel Board of Zoning Appeals met at 7:30 PM on Wednesday, October 13, 2004 in the Council Chambers of City Hall, Carmel, Indiana. The meeting opened with the Pledge of Allegiance.

Members in attendance were Leo Dierckman, James Hawkins, Madeleine Torres and Charles Weinkauf, thereby establishing a quorum. Jon Dobosiewicz and Mike Hollibaugh represented the Department of Community Services. John Molitor, Legal Counsel, was also present.

Mr. Dobosiewicz gave the Department Report. He stated there was a Memo before the Board dated October 13, 2004 from the Department of Community Services. There was a previous submittal requesting the Board to suspend or amend their Rules of Procedure. That document is being replaced by the proposal before the Board with regard to the conduct of the Public Hearing. The Department is asking one change to the proposal before it is considered. Under Items 2 and 3, the Department would like that one-hour time frame split in half, giving 30 minutes for each party.

Mr. Molitor gave the Legal Report. He had drafted an earlier Rule which was lengthier. He was unable to achieve consensus among the parties. He would recommend that the Board adopt the simplified Rule that the Department has suggested for the Board, with the exception that under Item 6 to substitute that each party shall proceed with cross examination of witnesses of the other parties immediately after the conclusion of the examination of the party who have brought that witness. In addition, he would then offer his assistance to the Board in extending the time if cross examination takes a significant amount of time. He would suggest that cross examination time not be charged to the party who has brought that witness to the hearing.

Mr. Hawkins moved to suspend Section 13, Rules 1-7 per the recommendation of the Department and as amended by Mr. Molitor. The motion was seconded by Mrs. Torres.

Discussion followed regarding suspending Section 13, 1-7 of the Rules of Procedure as amended by Mr. Molitor. As stated, it would be one hour per side, with one-half hour per person.

Mr. Dierckman moved to amend the motion to limit the time in Paragraphs 2 and 3 to 30 minutes per party, with 15 minutes per person, two on each side. Mrs. Torres seconded the motion to amend.

Only witnesses brought in by one of the parties would be cross examined, not the parties involved.

The amendment was **APPROVED 3-1**, with Mr. Weinkauf casting the opposing vote.

The motion to suspend the rules as amended was **APPROVED 3-1**, with Mr. Weinkauf casting the opposing vote.

H. Public Hearing:

1h. Martin Marietta, Appeal to Director's Determination of
The applicant would like to appeal a Director determination that Martin Marietta's operation is a legal, nonconforming use:
Docket No. 04070020 A Chapter 28.06 Existence of a Nonconforming Use
The site is located north of 106th Street and west of Hazel Dell Parkway. The site is zoned S-1/Residence - Low Intensity. Filed by Tom Yedlick.

Present for the Petitioner: Tom Yedlick, 5053 St. Charles Place. This is significant to the City because mining activity has been going on for over 30 years without regulation. The Zoning Ordinance does not provide adequate guidance on granting Use Variances for mining. Mining is only a temporary use of the land. After the mineral is exhausted, there needs to be a determination of how the land is to be used. Carmel Sand operation is a nuisance to the neighbors and homeowners in Kingswood and Wood Creek subdivisions. They have expectations and property rights when the minerals are exhausted and the nuisance and Temporary Use go away. The Board is facing new applications that are expansions of existing Non-Conforming Uses. The determination on expanding Non-Conforming Uses will set a precedent for pending applications. He included for the record his December 16, 2003 complaint letter, August 12, 2004 memorandum on points of authorities and the October 4, 2004 rebuttal to statements made and contained in Mr. Weiss' letter of June 18, 2004.

Comments made off microphone by Mr. Weiss and acknowledged by Mr. Weinkauf.

Mr. Yedlick continued. There are two issues tonight. If the processing plant is considered as part of mineral extraction, then that Use expires when there is no mineral extraction. The plant cannot be converted to commercial processing of off-site material. On the other hand, if the processing plant is considered a Use independent of mineral extraction, then the processing plat has never been a Permissible Use at any time because it is a Manufacturing Use in a residential area. The only conclusion is that the processing plant, regardless of how it got there, is currently operating as a Non-Conforming Use without a permit. Therefore, it is a zoning violation which should be stopped. He discussed the transition of the plant to a Non-Conforming Use. The Use determines the purpose of the processing plant. If the purpose is to process minerals extracted from the Carmel Sand Quarry, then the Use is to process those minerals only. Any change constitutes a change in the Non-Conforming Use and is impermissible without a permit. If the processing plant is an Independent Use, that is another issue, and it can only be expanded with a permit from this Board, because Uses that are Non-Conforming cannot be expanded or changed. Carmel Sand is an Existing Non-Conforming Use because it has never conformed to any Ordinance of this City. The Ordinance states that a Non-Conforming Use shall require a Special Use approval for any alternation in change in Use, enlargement or extension. The change of Use has been from mineral extraction to processing minerals not extracted on that property. The burden on changing a Use is on Martin Marietta. State Code tends to interpret Non-Conforming Uses in strict terms. Essentially the objective is a policy of Zoning Ordinances to secure the gradual or eventual elimination of Non-Conforming Uses and to restrict or diminish rather than increase such Uses. Martin Marietta is attempting to expand that Non-Conforming Use, rather than restrict it. He highlighted the information he had distributed to the Board regarding definition of Non-Conforming Use. He stated that the Use expires when the minerals are no longer there. The quarry operations have been going on since he was a resident in the area in 1993 and longer. Martin Marietta has not applied for nor received any Special Uses for the Non-Conforming Uses on the property. They have operated outside the Zoning Ordinance. The elements of quarry operation are extraction and

processing. The quarry operations are self-contained and identified with the property. The minerals are extracted and processed on-site. Once reserves are depleted, the basis for the quarry is over as a Non-Conforming Use and the property should revert back to the original, underlying zoned Use. You can't process what you don't extract. He had provided two cases on point, the Maxie case vs. BZA and a sand and gravel operation in Massachusetts, that were both denied.

Mr. Phears cross examined Mr. Yedlick. He pointed out Mr. Yedlick's signature, as President of the Kingswood Homeowners Association, on a document recognizing the Use established on the Martin Marietta property constituting a legal Non-Conforming Use. Mr. Yedlick stated it was his signature, but added that the Uses in place at that time were legal Non-Conforming Use, but the Uses have changed since that time. Mr. Phears questioned Mr. Yedlick regarding the time the processing plant and mine had been there. Mr. Yedlick agreed that they had been there when he moved to his home in 1993, but he did not know how long they had been there. Mr. Phears asked if he knew if the processing activities on this site predated the zoning authority of the City of Carmel. Mr. Yedlick did not know. Mr. Phears asked if he had coordinated this process with Mr. Thrasher and Mr. Yedlick said that he had not. Mr. Phears asked him that if there had been a plant there since before Carmel had zoning authority over it, would Mr. Yedlick agree that it was legal. Mr. Yedlick stated that if the plant was there before Carmel zoning authority, it is legal to the limited extent of the purpose and use of the plant at the time that it was there. Mr. Phears asked if Mr. Yedlick had any expertise in zoning law or mining. Mr. Yedlick stated he did not have expertise in zoning law, but has expertise in mining from his research. Mr. Phears asked if he had visited any other mines and Mr. Yedlick stated that he had visited a Martin Marietta one in Noblesville.

Phil Thrasher, for various individual remonstrators. His associate distributed a book of documentary evidence that he wanted introduced into evidence. Also present was his clerk, Laura Brook Conway, who complied most of the evidence from public records. He paged through the book and asked Ms. Conway if she prepared or gathered that evidence and kept it secure and not modified. Her affidavit was in the back of the book. She stated in the affirmative for each item.

Mr. Phears asked who Mr. Thrasher represented.

Mr. Thrasher stated he represented interveners: William D. McEvoy, Gregory Palinka, Susan Becker, Rex Weiper, Renee Cummingfeld and Donald K. Crabb individually. He stated that the Carmel Sand and Gravel operation had been illegal from the beginning. It has never conformed to the S-1 Zoning regulations of the City of Carmel. The Zoning Ordinance was in effect a long time before the digging started. The letter of determination from Mr. Hollibaugh was not appropriately issued because it blanketly said that everything that Martin Marietta is doing in Clay Township was and is a legal Non-Conforming Use. It does not state what those Uses are or where those Uses are. The exhibits prove that Martin Marietta has not been in an urban area since February 29, 1988. They were not in operation until two to three years later. Therefore, they could never have been a Conforming Use and the urban area exception would not have applied to them. So they could not generate a legal Non-Conforming Use. Martin Marietta will argue that they have a 2002 binding agreement, maybe even a 1997 agreement on the City of Carmel or on Kingswood Subdivision, that they are a legally Non-Conforming Use. That agreement has to be ratified by this Board. Therefore, it is not binding for purposes of Zoning. To be a legal Non-Conforming Use, it must conform to a predecessor Ordinance. It did not start until the 1990's and the area was already S-1 by then. Pursuant to Indiana Code Section 36.7.4.919d and the cases cited here, the Board does have the authority to do whatever it wants to do; reverse, affirm, modify, or rescind the letter, or you can start over. He had proposed Findings of Fact and Conclusions, and a request for relief. They are requesting that

the Board rescind the letter of June 24 and that a new letter of determination be issued. The Board can go further and suggest that the stockpiling of materials is an Illegal Use and should be removed. If they fail to conform, the Board can impose sanctions. He objected to not having adequate time to present his material and for the Board to review it.

Mr. Phears cross examined Mr. Thrasher. He asked Mr. Thrasher when it became an urban area. Mr. Thrasher replied, using Exhibit I, February 29, 1988. Mr. Phears asked if he did not agree that prior to that time, the City nor the County had the authority to regulate it from a zoning standpoint. Mr. Thrasher replied no, because the Zoning Ordinance was in effect from 1980. Mr. Phears stated that according to State Law, if it is outside an urban area the City and County cannot regulate it. Mr. Thrasher stated that a Plan Commission may not adopt an Ordinance restricting the complete use of mineral resources. Mr. Phears asked if Mr. Thrasher would agree that prior to 1988, Martin Marietta was free to use the mine free of the Carmel Zoning Ordinance. Mr. Thrasher agreed. Mr. Phears asked if Kingswood was paying Mr. Thrasher's fees. Mr. Thrasher stated that none had been paid, but he was submitting his bills as instructed by his client. None of his clients were residents of anywhere other than Kingswood.

Zeff Weiss, One American Square, attorney for Martin Marietta. The Petitioner is wrong on both the law and the facts. He confirmed with the Board's lawyer, John Molitor, the following legal issues. The area in question is zoned S-1, mineral extraction which includes processing is an integral part and is permitted as a Special Use in S-1. There is no Scheduled Use that would allow a processing plant and it is not in the M-1 district. Importation of sand and gravel to use at this sand plant is permitted under the Ordinance and Indiana Law, as long as it does not change the character of the operation. Mr. Thrasher and others want to read it differently and say that it was not intended that mining would be permitted in S-1. In the Schedule of Uses, under Industrial Uses, mineral, sand, gravel extraction operations are permitted in the S-1, S-2, R-1 districts. Mining took place in this area long before 1988 when the area became urban. He shared a map of the area. The Marburger parcel was purchased by American Aggregates, the predecessor to Martin Marietta, in 1964. In an affidavit from William Karns, who was with American Aggregates from 1959 to 1981, he states that American Aggregates acquired the property in 1964 and commenced mining in 1971. There were pictures from each year to verify the mining. An affidavit from John Tiberi, with Martin Marietta, stated that based on the review of the records, Martin Marietta continued to mine the property. The processing is an integral part of mineral extraction and it started before 1981. The Founders Park area was mined first, according to Mr. Karns, and it is contiguous to the Marburger parcel. American Aggregates started in one area and continued on down. As a matter of Indiana Law, that is one mine.

Mr. Thrasher objected to affidavits submitted by non-live witnesses.

Mr. Weiss stated that both witnesses were present.

Mr. Weiss continued, stating that Mr. Yedlick and Mr. Thrasher changed what the Ordinance said. He referred to Section 28.01.06 of the Ordinance which said that any existing Use is eligible for Special Use approval, shall not be considered Legal Non-Conforming Uses, nor require Special Use approval for continuance. If you are there before the Ordinance is applicable to you, you do not need to go through the process of getting a Special Use approval, you just continue to operate. Martin Marietta can go from Founders Park down to Mueller North pursuant to this particular Ordinance.

Mr. Phears showed aerials of the Founders Park area, which was the area of the processing plant in 1981 and earlier than that. Mr. Karns' affidavit states there has been a processing plant there since at least 1971

and actually further back. The company documented the Use of the properties every year. There are photos of operation from 1971 forward to 1984 of the Marburger property and Plant 512 which is the Keller property, now known as Founders Park. In April 1964, Mr. Leroy New stated that the activities of the business and the nature of mineral extraction would not be subject to the zoning authority of the Plan Commission.

Mr. Thrasher objected to the photos because the live witness was not present.

Mr. Phears stated that Mr. Karns was present.

Mr. Thrasher questioned Mr. Karns regarding the photos.

William R. Karns, 1106 Fairbanks, Carmel resident since 1968. Mr. Karns stated he had provided the pictures up to 1981, when he left the company. They were sent to the company headquarters in Greenville, Ohio, to the President of American Aggregates (name inaudible). They discussed houses on the Marburger property. He stated the plant was located north of 116th Street where Founders Park is currently located. It started as Gradle Brothers Gravel in possibly the late 1940's and American Aggregates acquired the property. That plant was torn down.

Mr. Weiss also questioned Mr. Karns regarding the photos. Mr. Karns stated the photos had been kept by American Aggregates and he had reviewed the original files that contained the photos that were presented today.

Mr. Thrasher questioned Mr. Tiberi regarding the photos from 1981 forward.

John Tiberi, 5306 Charles Court, Carmel, was sworn in. He stated that he joined Martin Marietta in July 2002. He had formerly been in Tampa, Florida. He did not know the exact date the Carmel Sand plant was put in its current location. From his review of the records, it was approximately 1990-1992.

Mr. Yedlick asked the Board to look at page 3 of the Settlement Agreement, Item 8. It stated that the City recognizes that the existing Non-Conforming Uses may not be substantially modified, expanded or added to without a change in zoning classification or approval of a Special Use or Variance. This settlement was also signed by Martin Marietta. On page 8, Item 6 states that Kingswood, Martin Marietta, Hughey and the City recognize that this agreement is for the purpose of settlement of a lawsuit and is not binding on the BZA, or the Plan Commission or the City Council in exercise of their responsibility of land use and zoning. From that we can gather that it has no substance here, it has no bearing on this Board.

Mr. Weiss and Mr. Phears made comments inaudible off microphone.

Mr. Phears stated that the reason it is relevant to this Board is because the folks appearing before this Board are making statements contrary to what they agreed to in this document. If they disagreed in 2002, they had an opportunity to appeal this matter and bring it before the Board or a Court of Law, which no one has done.

Mr. Yedlick read from the Uses in the S-1 of the Carmel Zoning Ordinance that mineral extraction, borrow pit, topsoil removal and storage were listed, but nothing about processing.

Mr. Weiss stated that what Mr. Yedlick read were the Development Standards, the minimum area requirements, not Uses. For Uses you need to go to the Schedule of Uses.

Mr. Yedlick disagreed. He wanted to know when Martin Marietta stopped extracting mineral from the east side of Hazel Dell on the Carmel Sand and Gravel property. The dredge has been parked for two years.

Mr. Phears stated that they hadn't stopped.

Mr. Yedlick wanted to know when the piping was removed from the dredge and it was no longer in use.

Mr. Tiberi stated that he believed the last date was in 2003 to dredge and it is currently idle. Minerals are being extracted with an excavator and backhoe.

Mr. Yedlick felt that was a change in Use from the original. With regard to the State Law, he asked if they agreed that it reads that this Chapter does not authorize the action of Plan Commission that would prevent outside areas complete use in relation to mineral resource. Is that your testimony that that constitutes zoning status?

Mr. Molitor recommended to the Board that the parties continue to make their closing statements then the discussion will turn to the Board and the Board could ask him legal questions.

Mr. Yedlick continued that one of the gentlemen had made the statement that importation is okay if it doesn't change the character of the use of the plant.

Mr. Phears stated that Indiana Law is that the importation does not change the Use in the case sited previously. He stated that Mr. Yedlick had concluded that any minor activity performed in connection with the Use changes, then the Use changes. He felt Mr. Yedlick failed to separate the work that makes up the Use from the Use. Uses are the categories in the Zoning Ordinance. The things that are done using an excavator, dredge or processing plant are the ways the Use is carried out, they are not the Use.

Mr. Weiss felt it did no good to debate the law with Mr. Yedlick and that facts could be covered in cross examination.

Mr. Weinkauf stated the cross examination would follow and questions could be handled at the end of closing arguments.

Mr. Phears had questions for Mr. Tiberi concerning the dredge and the Marburger property.

Mr. Tiberi stated that the dredge is still operable and could still be operated in the future. He stated the reserves on the Marburger property could be mined.

Mike Hollibaugh, Director of the Department of Community Services. He issued the letter on June 24, 2004. It was based on the 2002 agreement between Martin Marietta and Kingswood that established the land uses at that time as Legal Non-Conforming Uses. The letter stated those Uses, as suggested by Mr. Yedlick, were not expansions of the Uses.

Mr. Yedlick asked what Uses Mr. Hollibaugh was identifying.

Mr. Hollibaugh stated all the Uses that existed on the property at the time. He stated that the Uses were defined on page 3 of the May 2002 agreement: "the City recognizes the Uses now established on the Martin Property, including but not limited to the Hughey Operations, constitute legal, non-conforming uses." Part of his determination was that the importation of sand and gravel did not constitute a change that altered the Use. The processing plant was processing sand and gravel.

It was requested that all documents and affidavits submitted this evening be admitted into the record.

A 5 minute recess was taken.

Mr. Molitor stated that the Special Rules adopted under Suspension of the Rules for tonight allowed for a total of 15 minutes for statements or letters from non-parties and the public in regard to this appeal.

Members of the public were invited to speak in favor or opposition to the appeal; no one appeared.

Mr. Molitor stated that the Special Rule that was adopted allowed for each party to make a brief rebuttal or closing statement for a maximum of five minutes for each of the four parties.

Mr. Yedlick made a summation of what had been heard. The main extraction has stopped with only incidental digging. He felt processing stopped at the end of 2002. Processing is tied to the quarry and to extraction. He felt if there was no extraction then processing was not part of the process that had been going on, therefore it was a change. Bringing in materials to process is going from extraction to industrial use for processing. He felt Mr. Hollibaugh should not have used the settlement agreement for his letter of determination, because it does not recognize any changes since 2002. Therefore, his determination is invalid.

Mr. Thrasher also summarized. He felt they had established that the Carmel Sand Plant does not conform to the S-1 zoning classification, because mineral extraction is not permitted in S-1. They had established that a Special Use was needed and none had been obtained. They had established that the non-urban area exemption applied before 1989; however, evidence indicates that the current Carmel Sand Plant was erected sometime after 1990. The 2002 agreement does not have a role in these proceedings. The interveners did not sign the agreement and it is not binding on the City with respect to zoning. The settlement agreement did not create a right of appeal which was waived by people who did not know anything about it. There was no Legal Non-Conforming Use created by the lifting of the non-urban area exemption. It is a Non-Conforming Use that has always been illegal. Their argument that Sub-Section 28.01.06 would overturn the Carmel Zoning Ordinance is silly. He did not see a Carmel Sand Plant in any of the old photographs that were introduced by Martin Marietta. The plant Mr. Karns referred to was north of 116th Street and had been dismantled. Finally, DOCS did not have the information in the file to make a reasoned decision that was necessary to generate the letter of determination. He urged that DOCS be asked to rescind the letter and issue an appropriate letter with respect to suspending operation at the Carmel Sand Plant.

Mr. Phears indicated that there were repeated references to the Carmel Sand Plant in the documents and photographs since 1985. Mr. Karns' affidavit recites the facts about the Carmel Sand Plant. It is referred to sometimes as Carmel Plant and sometimes as Plant #512. The Use that was established on this site has

always had a processing use as sand and gravel plants do. The idea of importation being a Use is crazy. Uses are the things listed in the Schedule of Uses; in this case it is mining and extraction operations. This is widely interpreted as things typically a part of the mining process, which includes getting it from the mine to a finished product. You do not want processing occurring ten miles away; you want it to be fairly close to each other. It is not ongoing now because of the multiple disputes they are involved in. They would like to move the plant east of Hazel Dell and then the area where the plant site is would be mined out. The Case of Day vs. Ryan in Indiana Court of Appeals in 1990 states that the trading of livestock raised elsewhere did not work a transformation of the basic agricultural nature of the Ryan's use of the property. Founders Park and the Marburger property were all part of one mine. The Marburger property was acquired in 1964 and the Founders Park area prior to that. The mine began in the Founders Park area and progressed to the south to the current location. There are limited reserves left around the area where the plant is which will be mined when they are allowed to move the plant to the east of Hazel Dell. He addressed their Findings of Fact. The warranty deed showed the property was secured in 1964. Mining commenced as early as 1971 as shown in the photographs. There was processing equipment in the area per the photographs, their descriptions and Mr. Karns' affidavit. It was outside an urban area until sometime in 1988. The two agreements, 2002 and 1997, are not irrelevant. Both agreements state the Uses are lawful.

Mr. Hollibaugh wanted to clarify for the record that the 2002 agreement was not the only item used when he measured the whole issue of importation of sand and gravel as an expansion of Non-Conforming Use. Other things he looked at were the Zoning Ordinance, specifically Chapter 28, the Weiss letter dated June 18, the Yedlick letter of 2003, and the Yedlick white paper.

Mr. Molitor stated that, according to normal procedure, at this point the Board members would ask any questions. He suggested that the Board members had received a lot of information and they may want to make a motion to take those materials under advisement and come back to the next meeting and ask the questions.

Mr. Dierckman asked if there were Findings of Fact.

Mr. Yedlick's were attached to his appeal.

Mr. Hawkins asked if the Department had looked over the Findings of Fact or were they from Martin Marietta.

Mr. Hollibaugh stated he had not had time to look at them.

Mr. Weiss suggested that the Board could vote and the Board's attorney or Department could draft the Findings.

Mr. Weinkauf stated that the Board did not vote and then offer the opportunity for people to draft the Findings.

Mr. Phears asked if the Board could legally close the evidence.

Mr. Molitor stated that the BZA Hearing remains open until the Board is ready to vote. He did not know if the Board would be willing to receive any new evidence unless one of the parties demonstrates there has been new evidence discovered.

Mr. Dierckman moved to continue this Public Hearing to Old Business at the regularly scheduled BZA Hearing on October 25, 2004. No statement will be made by either party. It will be the prerogative of the Board to ask any questions at that time of either party or the public. The motion was seconded by Mr. Hawkins and **APPROVED 4-0.**

I. Old Business

There was no Old Business.

J. New Business

There was no New Business.

K. Adjourn

Mr. Hawkins moved to adjourn. The motion was seconded by Mrs. Torres and **APPROVED 4-0.**

The meeting was adjourned at 9:50 PM.

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Charles Weinkauf, President

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Connie Tingley, Secretary

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